

Rulemaking by Department of Revenue

Revenue Laws Study Committee

March 7, 2012

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Overview-Rulemaking in General

- Rulemaking: Process for administrative agencies to create new rules and meet Constitutional requirements for notice
- NC Administrative Procedure Act (APA)
 - Chapter 150B contains APA
 - APA requires fiscal note, publication of proposed rule, hearing and comment period, and approval by Rules Review Commission

Rulemaking by Dept of Revenue

□ 2 Tracks

■ Rulemaking under APA

GS 105-262: “The Secretary . . . may adopt rules”
under GS 150B-1 and Article 2A of Chapter 150B

■ Bulletins and Directives

GS 105-264: “When the Secretary interprets a law
by adopting a rule or publishing a bulletin or
directive on the law . . . taxpayers are entitled to rely
upon the interpretation.”



Track 1:Bulletins

- ❑ Technical Bulletins present the administrative interpretation and application of tax laws
 - Corporate, Excise, and Insurance Tax Bulletins
 - Individual Income Tax Bulletins
 - Sales and Use Tax Technical Bulletins
- ❑ Bulletins generally updated annually
- ❑ Bulletins reflect tax law changes made by General Assembly



Track 1: Directives

- Directives issued on as-needed basis
 - To set out interpretation of a tax law
 - To explain the application of law to stated facts
 - To clarify an issue on which the Department has received numerous questions
- Once issued, Directives are not updated to reflect changes in the law or administrative interpretation



Track 2: Rules under APA

- ❑ Dept of Revenue issues rules
- ❑ Not updated annually
- ❑ May not reflect current law
- ❑ Rarely used

APA Applied to Dept of Revenue

- ❑ Dept. of Revenue is exempt from the notice and hearing requirements - GS 150B-1(d)(4)
- ❑ Definition of a rule does not include
 - Nonbinding interpretative statements . . . that merely define, interpret, or explain the meaning of a statute or rule – GS 150B-2(8a)(c)
 - Statements that set forth criteria or guidelines to be used by the staff of an agency in performing audits, investigations, or inspections – GS 150B-2(8a)(g)

Tracks Compared

	Rulemaking under APA	Bulletins and Directives
Frequency of Use	Rarely used	Regularly used
Timeliness	Several months delay	Issued immediately; no delay
Notice and Hearing	No, unless rule affects corporate “combination” audits	No
OSBM Fiscal Note	Yes	No
Approval by Rules Review Commission	Yes	No
Updated	Rarely	Directives updated annually



Issue in Corporate Audits

- ❑ Dept. of Revenue issued Directive CD-11-01 on November 16, 2011 titled “Secretary's Authority to Adjust the Net Income of a Corporation or to Require a Corporation to File a Combined Return”
- ❑ Corporate taxpayers argue Directive CD-11-01 should be subject to rulemaking under APA

Option 1

- ❑ Require rules be adopted under APA on combination audits discussed in Directive CD-11-01
- ❑ General Assembly used this option in the past
 - GS 105-262(b) requires notice and hearing for rules affecting combination audits
 - Formerly Section 31.10.(b) of S.L. 2010-31 required rules be adopted under APA on combination audits before penalties applied

Option 2

- Require Dept. of Revenue issue all guidance through APA rulemaking
 - Major change to existing practice
 - Value to immediate statements from the Dept. of Revenue giving certainty to taxpayers
 - For example, filing deadlines; federal law changes
 - Annual updates
 - Statements may be exempt from APA because definition of rule does not include nonbinding interpretative statements and audit guidelines